Kebabangan Petroleum Operating Co Sdn Bhd v Mikuni (M) Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCVC)-2295–11 OF 2018
VERNON ONG, SURAYA OTHMAN AND HAS ZANAH MEHAT JJCA
7 DECEMBER 2020

Arbitration — Agreement — To refer matter to arbitration — Contract contained clause for disputes between parties to be resolved by way of arbitration — Plaintiff referred dispute to Kuala Lumpur Regional Centre for Arbitration ('KLRCA') and paid its portion of provisional advance deposit required by KLRCA for arbitration to be held — Defendant failed/refused to pay its portion of the deposit despite being reminded to do so several times by plaintiff and KLRCA — One year later plaintiff filed civil suit against defendant — Defendant applied to stay the suit under s 10 of the Arbitration Act 2005 pending referral of dispute to arbitration and also applied to strike out plaintiff's suit on merits under O 18 r 19 of the Rules of Court 2012 — Whether High Court was wrong in granting stay of the suit — Whether arbitration clause in contract was rendered inoperative by defendant's non-response to plaintiff's move to arbitrate the dispute — Whether defendant's conduct showed disinterestedness and abandonment of its right to arbitrate under the contract — Whether defendant's application to strike out plaintiff's suit on the merits was a step taken in the suit that showed it preferred the dispute to be determined by the court rather than by arbitration

The appellant had a supply contract with the first respondent ('Mikuni') whose directors at the material time were the second to the fifth respondents ('the directors'). On discovering that Mikuni had not supplied parts in accordance with the contract, the appellant referred its dispute with Mikuni to arbitration in September 2016 in exercise of its rights under the contract's arbitration clause. Mikuni filed a response to the arbitration. In November 2016, the Kuala Lumpur Regional Centre for Arbitration ('KLRCA'), to which the arbitration had been referred, directed the parties to pay a provisional advance deposit in the sum of RM55,800 in equal shares within three weeks so that the arbitration could commence. The appellant paid its portion (RM27,900) of the deposit by the end of November 2016 but Mikuni failed and/or refused to pay its portion of the deposit despite being reminded numerous times to do so by the appellant and by KLRCA between late November 2016 and March 2017. In November 2017, the appellant filed a civil suit in the High Court against Mikuni and the directors for, respectively, breach of contract and for fraud/fraudulent misrepresentation. Pursuant to s 10 of the Arbitration Act 2005 ('the AA'), all the respondents (except the fourth respondent) applied to stay the civil suit pending reference of the dispute to arbitration. That

application was followed by another application by the respondents under O 18 r 19 of the Rules of Court 2012 to strike out the appellant's suit. In resisting both applications, the appellant contended that: (a) the arbitration agreement between the parties had become inoperative on account of Mikuni's disinterestedness and failure to pay its portion of the deposit that was required by KLRCA; and (b) the striking out application was a step taken by Mikuni in the civil suit proceedings which, under s 10 of the AA, disentitled it from asking for the matter to be referred to arbitration. The High Court dismissed the striking out application but allowed the application to stay the suit pending arbitration. In the instant appeal against the granting of the stay application, the appellant also pointed out that there was no basis for the High Court to stay the civil suit against the directors since they were not parties to the arbitration agreement contained in the contract between the appellant and Mikuni.

Held, unanimously allowing the appeal, setting aside the High Court's decision, and ordering the suit against the respondents to be proceeded with:

(1) Mikuni's conduct in unreasonably and deliberately delaying or not paying its portion of the provisional advance deposit to KLRCA and its sheer unresponsiveness and callous disregard to the letters issued by the appellant and KLRCA had rendered the arbitration agreement between itself and the appellant inoperative. Mikuni's conduct indicated that it was disinterested and was unequivocally abandoning its right under the umbrella agreement to refer the matter to arbitration (see paras 35 & 53).

(2) The High Court judge erred in not appreciating that the application to strike out the appellant's civil suit on merits was an affirmation by the respondents of the court's jurisdiction to adjudicate their dispute with the appellant and that it constituted a step in the proceedings. The filing of the striking out application clearly evinced an unequivocal intention on the respondents' part to submit to the court's jurisdiction and to proceed with the civil suit in preference to arbitration. In their application, the respondents had prayed, first, for the suit to be struck out on merits and, alternatively, for it to be stayed. This was not consonant with s 10 of the AA and by doing so the respondents had foreclosed any argument on their part that they had reserved their rights to arbitrate the matter (see paras 38, 41, 43 & 53).

(3) The court proceedings against the directors should not have been stayed as they were not parties to the arbitration agreement between the appellant and Mikuni. Section 10 of the AA had no application in so far as the appellant's claims against the directors were concerned (see paras 45–45).

(4) The High Court would not have granted a stay of the civil suit vis a vis the directors if it had considered the following factors: (a) that the claims against the directors were in their personal capacities and was not

dependent on Mikuni's breach of the umbrella agreement; (b) that the directors were not parties to the arbitration agreement and the decision of the arbitral tribunal would not bind them; (c) that the outcome of the civil suit would afford certainty in evidence with respect to the veracity of the claims of fraud and/or fraudulent misrepresentation against the directors, which would facilitate the arbitration to a great extent rather than prejudice it; and (d) that there was a real likelihood the directors might seek to re-litigate the issues if the result of the arbitration did not favour them (see paras 50–51).

[Bahasa Malaysia summary

Perayu memasuki kontrak pembekalan dengan responden pertama ('Mikuni') yang mana pengarahnya pada masa material adalah yang responden kedua hingga kelima ('pengarah tersebut'). Setelah mengetahui bahawa Mikuni tidak membekalkan alat bersesuaian dengan kontrak, perayu merujuk pertikaiannya dengan Mikuni ke timbang tara pada bulan September 2016 dalam menggunakan haknya berdasarkan klausa timbang tara kontrak tersebut. Mikuni memfailkan Balasan kepada timbang tara. Pada bulan November 2016, Pusat Timbang Tara Serantau Kuala Lumpur ('KLRCA'), yang mana timbang tara tersebut dirujuk, telah mengarahkan pihak-pihak untuk membayar deposit pendahuluan provisional berjumlah RM55,800 secara sama rata dalam tempoh tiga minggu supaya timbang tara boleh dimulakan. Perayu telah membayar sebahagiannya (RM27,900) untuk deposit tersebut pada akhir November 2016 tetapi Mikuni gagal dan/atau enggan membayar bahagian untuk deposit tersebut walaupun telah diberi peringatan berkali-kali oleh perayu dan oleh KLRCA antara akhir November 2016 hingga Mac 2017. Pada bulan November 2017, perayu memfailkan saman sivil di Mahkamah Tinggi terhadap Mikuni dan pengarah-pengarah, masing-masing, atas pelanggaran kontrak dan untuk representasi salah/frod. Berdasarkan s 10 Akta Timbang Tara 2005 ('ATT'), kesemua responden (kecuali responden keempat) memohon untuk menggantungan tuntutan saman tersebut sementara menunggu rujukan pertikaian ke timbang tara. Permohonan itu diikuti oleh permohonan lain oleh responden di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 bagi membatalkan saman perayu. Dalam menahan kedua-dua permohonan tersebut, perayu berpendapat bahawa: (a) perjanjian timbang tara antara pihak-pihak tersebut telah menjadi tidak berfungsi oleh kerana Mikuni tidak berminat dan kegagalan untuk membayar bahagian untuk deposit yang diperintahkan oleh KLRCA; dan (b) permohonan pembatalan saman adalah satu langkah yang diambil oleh Mikuni dalam prosiding saman sivil yang mana, di bawah s 10 ATT, menghalangnya dari memohon agar perkara tersebut dirujuk ke timbang tara. Mahkamah Tinggi menolak permohonan pembatalan saman tersebut tetapi membenarkan permohonan tersebut penggantungan saman sementara menunggu timbang tara. Dalam rayuan semasa terhadap pembenaran permohonan penggantungan, perayu juga membangkitkan bahawa tidak ada asas bagi

Mahkamah Tinggi untuk menggantung tuntutan sivil terhadap pengarah-pengarah kerana mereka bukanlah pihak dalam perjanjian timbang tara yang terkandung dalam kontrak antara perayu dan Mikuni.

Diputuskan, sebulat suara membenarkan rayuan, mengenepikan keputusan Mahkamah Tinggi, dan memerintahkan agar tuntutan terhadap responden diteruskan:

(1) Tindakan Mikuni yang tidak wajar dan sengaja melambatkan atau tidak membayar bahagian untuk deposit pendahuluan provisional kepada KLRCA dan tindakannya yang tidak responsif dan tidak mengendahkan surat-surat yang dikeluarkan oleh perayu dan KLRCA telah membuat perjanjian timbang tara antaranya dan perayu tidak dapat dilaksanakan. Tindakan Mikuni menunjukkan bahawa ia tidak berminat dan tanpa keraguan telah mengabaikan haknya di bawah *umbrella agreement* dalam merujuk perkara tersebut ke timbang tara (lihat perenggan 35 & 53).

(2) Hakim Mahkamah Tinggi telah terkhilaf apabila tidak mengambilkira bahawa permohonan untuk membatalkan tuntutan sivil perayu adalah suatu persetujuan oleh responden dalam bidang kuasa mahkamah untuk membicarakan pertikaian mereka dengan perayu dan ianya merupakan langkah bagi suatu prosiding. Pemfailan permohonan membatalkan sama membuktikan niat tanpa keraguan pada pihak responden untuk merujuk kepada bidang kuasa mahkamah dan untuk meneruskan tuntutan sivil berbanding timbang tara. Dalam permohonan mereka, responden telah memohon, pertama, agar saman tersebut dibatalkan pada merit dan, secara alternatifnya, agar tuntutan tersebut digantung. Ini tidak selari dengan s 10 ATT dan dengan berbuat demikian responden telah menutup sebarang hujahan dari pihak mereka bahawa mereka telah merizabkan hak mereka supaya perkara tersebut ditimbang tara (lihat perenggan 38, 41, 43 & 53).

(3) Prosiding mahkamah terhadap pengarah-pengarah seharusnya tidak digantung kerana mereka bukanlah pihak dalam perjanjian timbang tara antara perayu dan Mikuni. Seksyen 10 ATT tidak mempunyai peruntukan berhubung dengan tuntutan perayu terhadap pengarah-pengarah (lihat perenggan 45–46).

(4) Mahkamah Tinggi tidak akan memberikan penggantungan tuntutan saman terhadap pengarah-pengarah sekiranya ia mempertimbangkan faktor-faktor berikut: (a) bahawa tuntutan terhadap pengarah-pengarah adalah atas pada kapasiti peribadi mereka dan tidak bergantungan pada pelanggaran *umbrella agreement* oleh Mikuni; (b) bahawa pengarah-pengarah bukanlah pihak dalam perjanjian timbang tara dan keputusan tribunal timbang tara tidak akan mengikat mereka; (c) bahawa keputusan tuntutan sivil tersbeut akan memberikan kepastian dalam bukti berkenaan dengan kebenaran mengenai dakwaan

representasi salah dan/atau frod terhadap pengarah-pengarah, yang akan memudahkan timbang tara berbanding memperudiskannya; dan (d) bahawa terdapat kemungkinan nyata pengarah-pengarah mungkin berusaha untuk membicarakan semula isu-isu tersebut sekiranya keputusan timbang tara tidak menyebelahi mereka (lihat perenggan 50–51).]

Cases referred to

Comos Industry Solution GMBH v Jacob and Toralf Consulting Letrikon Sdn Bhd & Ors [2012] 4 MLJ 573, CA (distd)

L Capital Jones Ltd and another v Maniach Pte Ltd [2017] SGCA 63; [2017] 1 SLR 312, CA (refd)

Linde Gas Malaysia Sdn Bhd v Pasifik Utama Sdn Bhd & Anor [2011] 5 CLJ 40, CA (refd)

Protasco Bhd v Tey Por Yee and another appeal [2018] MLJU 993; [2018] 5 CLJ 299, CA (refd)

Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals [2015] SGCA 57, CA (refd)

ZAQ Construction Sdn Bhd & Anor v Putrajaya Holdings Sdn Bhd [2014] 10 MLJ 633, HC (refd)

Legislation referred to

Arbitration Act 2005 ss 9, 10, 10(1)
Rules of Court 2012 O 18 r 19(1)(b)

Appeal from: Suit No WA-22NCVC-595–11 of 2017 (High Court, Kuala Lumpur)

Mohd Arief Emran bin Arifin (Eddie Chuah, Chong Ker Ling and Calvin Wong with him) (Wong & Partners) for the appellant.
K Kirubakaran (Audrey Quah with him) (Shui-Tai) for the first, second, third and fourth respondents.
Amir Amsyar bin Mohd Nazir (Ganesh & Co) for the fifth respondent.

Suraya Othman JCA (delivering judgment of the court):

INTRODUCTION

[1] All the five respondents/defendants except the fourth respondent/defendant filed a notice of application (encl 7) for a stay of proceedings of the civil suit pending the matter being referred for arbitration pursuant to s 10 of the Arbitration Act 2005. The High Court on 11 October 2018 allowed the respondents application for stay (encl 7). The appellant/plaintiff, dissatisfied, appealed against that decision. We heard the appeal and allowed the appeal. We now give our reasons for doing so.

CASE BACKGROUND

[2] The appellant, Kebabangan Petroleum Operating Company Sdn Bhd is a company incorporated for the purpose of carrying out the exploration and production of petroleum pursuant to a production sharing contract for the benefit of Petroleum Nasional Bhd ('Petronas') and its co-ventures.

[3] The first respondent, Mikuni (M) Sdn Bhd was the supplier of actuated ball valves for the appellant's offshore activities.

[4] The second to fifth respondents, Yong Chun Khiong, Hj Ismail bin Bahari, Aminuddin bin Idrus and Mohd Najib bin Ahmed @ Ahmad were the directors of the first respondent at the material time and were sued for, inter alia, for fraud and/or fraudulent misrepresentation.

[5] On 22 December 2010, the appellant and the first respondent entered into the umbrella agreement. It was a contractual requirement for the first respondent to supply ball valves manufactured by and sourced directly from OMB Valves SpA in Italy ('OMB').

[6] The appellant subsequently discovered that all the ball valves supplied by the first respondent were counterfeit ball valves.

[7] The appellant then filed a notice of arbitration dated 23 September 2016 against the first respondent. The first respondent responded by filing a response to the notice of arbitration dated 20 October 2016.

[8] By a letter dated 8 November 2016, the Kuala Lumpur Regional Centre for Arbitration ('KLRCA') directed the parties to pay a provisional advance deposit in the sum of RM55,800 in equal shares by 29 November 2016. On 29 November 2016, the appellant paid its portion of the deposit in the sum of RM27,900. However, the first respondent failed to pay its portion of the deposit despite numerous reminders sent from November 2016 till March 2017.

[9] The appellant then filed a civil suit on 1 November 2017 against the first respondent, for, inter alia, breach of its contractual obligations for supplying counterfeit ball valves to the appellant. The second to fifth respondents who were the directors of the first respondent at the material time were sued for, inter alia, for fraud and/or fraudulent misrepresentation.

[10] All the respondents (except the fourth respondent) then applied to the High Court by way of a notice of application filed on 6 December 2017

(enclosure to stay the civil suit (current proceedings) pending the matter to be referred to and disposed of by arbitration.

[11] The respondents application is premised on cl 31 of the terms and conditions of the umbrella agreement between the appellant and the first respondent.

[12] The appellant objected to the stay application (encl 7) and contended that any arbitration agreement which existed between the parties had become inoperative since the first respondents had failed and/or refused to pay its portion of the provisional advance deposit in the sum of RM27,900 to KLRCA.

[13] The respondents subsequently filed a notice of application on 15 February 2018 (encl 24) to strike out the appellant's writ against them pursuant to O 18 r 19(1)(b) of the Rules of Court 2012.

[14] The appellant contended that the striking out application by the respondents of the appellant's writ (encl 24) tantamount or constitute to the respondents taking steps in the proceedings (taking steps in the civil suit) and by doing so, the respondents can no longer insist on the matter to be referred for arbitration.

[15] On 11 October 2018, both the applications were heard simultaneously by the High Court. The High Court allowed the respondents application for a stay of the appellant's civil suit (encl 7) pending the disposal of arbitration between the appellant and the first respondent and dismissed the respondents application to strike out the appellant's writ in encl 24. The High Court ordered a stay of the civil suit against all the respondents pending the disposal/conclusion of the arbitration between the appellant and the first respondent.

[16] Aggrieved with the High Court's decision, the appellant filed this appeal to this court. The appellant's appeal is only confined to the High Court's decision on the stay application in encl 7.

HIGH COURT DECISION

[17] Enclosure 7 was heard in the High Court which allowed a stay of the proceedings against all the five respondents pending the conclusion of the arbitration between the appellant and the first respondent.

[18] The learned judge found that based on cl 31 of the umbrella agreement, there existed an arbitration agreement between the appellant and the first

respondent. The learned judge held that in accordance to s 10(1) of the Arbitration Act 2005, where an arbitration agreement is valid, operative and capable to be performed, the court shall grant a stay of the civil suit and refer the matter to arbitration.

[19] The learned judge was of the view that when the first respondent paid its portion in the sum of RM27,900 of the total provisional advance deposit of RM55,800 to its solicitors on *9 January 2018*, the arbitration proceedings had effectively commenced. This, according to the learned judge, is especially so when the notice of arbitration dated *23 September 2016* was issued by the appellant against the first respondent and the nominated presiding arbitrator had already accepted the nominations by the appellant and the first respondent on *15 December 2016*.

[20] The learned judge was also of the view that the filing of encl 24 by the respondents to strike out the appellant's writ (civil suit) does not constitute as 'taking any other steps in the proceedings' (civil suit) pursuant to s 10(1) of the Arbitration Act 2005. The learned judge referred and applied the Court of Appeal decision in *Comos Industry Solution GMBH v Jacob and Toralf Consulting Letrikon Sdn Bhd & Ors* [2012] 4 MLJ 573 in arriving at his decision.

THE APPELLANT'S GROUNDS OF APPEAL

[21] The appellant raised three main grounds of appeal and they are as follows:

(a) the learned judge had failed to appreciate that the agreement to arbitrate between the appellant and the first respondent had been rendered inoperative by virtue of the first respondent's conduct including, inter alia, the first respondent's wilful refusal to pay its portion of the provisional advance deposit for the arbitration to proceed and the first respondent's failure to respond to the multiple letters from the appellant and KLRCA/AIAC ('ground 1');

(b) the learned judge had failed to consider that the respondents had willingly submitted to this court's jurisdiction and had taken steps in the court proceedings by applying to strike out the civil suit ('ground 2'); and

(c) the learned judge had erred in deciding that the appellant's claim against the remaining respondents (second respondent to fifth respondent) who are not parties to the arbitration agreement should be stayed pending the disposal of the arbitration between the appellant and the first respondent ('ground 3').

A THE APPEAL

The appellant's submission

B **[22]** Before the Court of Appeal, the appellant submitted that the arbitration agreement between the appellant and the first respondent is inoperative by virtue of the first respondent's following conduct:

(a) the first respondent had deliberately refused to pay its portion in the sum of RM27,900 of the total provisional advance deposit of RM55,800 as C required by the rules to commence the arbitration proceedings; and

(b) the first respondent had turned a deaf ear or had refused to respond to the 6 separate letters issued by the appellant and KLRCA demanding for its portion of the payment of the provisional advance deposit, deliberately causing delay to the arbitration. The first respondent only D paid the said deposit to its solicitor on *9 January 2018* after the appellant had filed its civil suit on 1 November 2017.

[23] The appellant further submitted that the respondents had taken steps in E the proceedings and were willing to proceed with the civil suit. The appellant argued that by the filing of encl 24, the respondents had affirmed the court's jurisdiction to adjudicate on the dispute, thereby constituting taking 'any other steps in the proceedings' and the High Court had misapplied the principles as laid down by the Court of Appeal in *Comos Industry Solution GMBH*.

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[24] The appellant also submitted that even if the learned judge had taken the view that the proceedings should be stayed in view of the arbitration agreement between the appellant with the first respondent, the proceedings against the remaining respondents (second respondent to the fifth respondent), G who are not parties to the arbitration agreement, ought not or should not have been stayed.

The respondents submission

H **[25]** On the other hand, the respondents submitted that the appellant is not entitled to initiate the civil suit against the respondents since the respondents (except for the first respondent), were never a party or privy to the agreement which is the subject matter of the civil suit. The respondents contended that the appellant would first have to prove its claim against the first respondent which I is pending in arbitration.

[26] The respondents also argued that the arbitration clause was very clear and formed part of the agreement between the appellant and the first respondent. The appellant by filing the notice of arbitration dated 23

September 2016 had invoked cl 31 of the umbrella agreement to resolve the dispute by arbitration and therefore should be estopped from taking a contrary position. The respondents submitted that pursuant to s 10(1) of the Arbitration Act 2005, it is clear that the court shall grant a stay of the proceedings pending disposal of arbitration where a party makes an application for stay before 'taking any other steps in the civil suit' unless the court found that the arbitration agreement is null and void, inoperative or incapable of being performed.

[27] The respondents further submitted that the appellant had only raised one issue in its affidavits opposing encl 7, ie, that the refusal by the first respondent to pay its portion of the provisional advance deposit for the arbitration proceedings to commence has rendered the arbitration agreement null and void, inoperative or incapable of being performed. The respondents further submitted that the first respondent's solicitors had via their letter dated 10 January 2017 informed KLRCA that they were waiting for the first respondent's reply and since it was the last two weeks of 2016 and the beginning of 2017, many of the first respondent's directors and/or employees were not working and therefore the solicitors were unable to revert with instructions accordingly. Further, the first respondent had deposited its portion of the provisional advance deposit of RM27,900 with its solicitors on *9 January 2018*.

OUR DECISION

[28] We heard the appeal and after careful consideration of learned counsels oral as well as written submissions, the appeal records and legal authorities, we found merits in the appellant's appeal. We unanimously allowed the appeal and set aside the decision of the learned judge. We set out below our reasons for doing so.

Principles applicable in the granting of a stay of court proceedings pending disposal of arbitration under s 10 Arbitration Act 2005

[29] Section 10(1) of the Arbitration Act 2005 (Act 646) provides as follows:

> 10 Arbitration agreement and substantive claim before court
>
> (1) A court before which proceedings are brought in respect of a matter which is the *subject of an arbitration agreement* shall, *where a party makes an application before taking any other steps in the proceedings,* stay those proceedings and refer the parties to arbitration *unless it finds that the agreement is null and void, inoperative or incapable of being performed*.

[30] Section 9 of the Arbitration Act 2005 defines an arbitration agreement as follows:

9 *Definition and form of arbitration agreement*

(1) In this Act, arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing where it is contained in

(a) a document signed by the parties;

(b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or

(c) an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

[31] In our present case, the arbitration clause is found in cl 31 in Part 2 of the terms and conditions of the umbrella agreement. The arbitration clause formed part of the contract between the appellant and the first respondent which states as follow:

31. ARBITRATION

31.1 *All disputes, controversies or claims arising out of or in connection with this UMBRELLA AGREEMENT* and/or any PURCHASE ORDER which cannot be settled amicably *shall be settled by arbitration* in accordance with the rules of the Regional Centre for Arbitration, Kuala Lumpur before a panel of three (3) arbitrators. The place of arbitration shall be Kuala Lumpur and the language of arbitration shall be English.

31.2 Pending the resolution of any disputes, controversies or claims arising out or relating to this UMBRELLA AGREEMENT and/or any PURCHASE ORDER, the SELLER shall perform and/or continue performing all its obligations specified in the UMBRELLA AGREEMENT and/or any PURCHASE ORDER.

31.3 The award of the arbitrators shall be final and binding upon the parties. The costs of the arbitration shall be borne by the party whose contention was not upheld by the arbitration tribunal, unless otherwise provided in the arbitration award. (Emphasis added.)

[32] In his written judgment, the learned judge had cited the Court of Appeal case of *Linde Gas Malaysia Sdn Bhd v Pasifik Utama Sdn Bhd & Anor* [2011] 5 CLJ 40, which provides guidance as to the requirements of a stay of proceedings pending the disposal of arbitration. The requirements being that

the power to stay court proceedings is premised on the existence of an agreement to arbitrate and it is conditional upon the stay application being made before any steps are taken in the court proceedings:

> *The power to stay court proceedings is premised on the existence of an agreement to arbitrate* and the disputes therein contemplated. *The exercise of such discretion is conditional upon the application being made before any steps are taken in that proceedings.* That same position is in fact maintained in the Arbitration Act 2005 except that the new s 10(1) now makes it mandatory to order a stay of court proceedings upon application being made, other conditions remaining but specifically prescribed. (Emphasis added.0

[33] In the case of *ZAQ Construction Sdn Bhd & Anor v Putrajaya Holdings Sdn Bhd* [2014] 10 MLJ 633 (HC), the court at p 634, states that s 10(1) of the Arbitration Act 2005 is couched in mandatory terms by the use of the word 'shall' and the court is obliged to stay court proceedings and refer the parties to arbitration. The only exception to this is provided within s 10(1) itself and that is where the court finds the agreement to be null and void, inoperative or incapable of being performed:

> The language in s 10(1) of the Act is couched in mandatory terms with the use of the word 'shall'. Where the terms of s 10(1) are met, *the court is obliged to stay court proceedings and refer the parties to arbitration. The only exception to this is provided within s 10(1) itself and that is where the court finds the 'agreement to be null and void, inoperative or incapable of being performed.* (Emphasis added.)

Thus, from the cases cited above, under s 10(1) Arbitration Act 2005, the court shall grant a stay pending arbitration where there existed an agreement to arbitrate and a party who makes an application for a stay, makes it before taking any other steps in the court proceedings. If these two requirements are met, the court will grant the stay unless the court finds that the agreement is null and void, inoperative or incapable of being performed.

The first ground of appeal: Conduct of the first respondent rendered the arbitration agreement between the appellant and the first respondent inoperative

[34] We found that the learned judge had erred in not considering the facts that several reminders had been given to the first respondent to pay its portion of the provisional advance deposit. KLRCA had by a letter dated 8 November 2016 directed parties to pay the deposit by 29 November 2016. The appellant paid its portion on 29 November 2016. The first respondent did not pay its portion despite numerous reminders sent by the appellant and KLRCA from November 2016 to March 2017. The appellant received no response from the first respondent. It was only after the appellant had filed the civil suit on 1 November 2017 that the first respondent only deposited its portion of the said deposit with its solicitors on *9 January 2018*. This was after more than a year

had passed since the appellant had deposited its portion of the said deposit on 29 November 2016 to KLRCA.

[35] We were of the view that the first respondent's conduct in unreasonably and deliberately delaying the payment of its portion of the provisional advance deposit or the first respondent's persistence in refusing to pay and its sheer unresponsiveness and callous disregard to the letters issued by the appellant and KLRCA, had rendered the arbitration agreement between the appellant and the first respondent inoperative. The conduct of the first respondent had indicated that it was disinterested and is abandoning its intention to proceed with the arbitration, thereby waiving its rights for arbitration under the Umbrella Agreement.

Second ground of appeal: The respondents had taken steps in the proceedings therefore, had willingly submitted to the court's jurisdiction to proceed with the civil suit/or had clearly evinced an unequivocal intention to participate in the court's proceeding in preference to arbitration

[36] Apart from filing a stay application in encl 7 on 6 December 2017, the respondents on 15 February 2018, had also filed an application in encl 24 to strike out the appellant's Writ.

[37] The learned judge held that the filing of encl 24 did not constitute a step in the proceedings within the meaning of s 10(1) of the Arbitration Act 2005 by virtue of the Court of Appeal decision in *Comos Industry Solutions GMBH*.

[38] In this, we felt that the learned judge had failed to appreciate that encl 24, being an application to strike out the appellant's writ on merits is an affirmation by the respondents of the court's jurisdiction to adjudicate on the dispute, thereby constituting a step in the proceedings. The learned judge had misapplied the principles as laid down by the Court of Appeal in *Comos Industry Solutions GMBH*, which states as follows:

> [14] *Whether an action amounts to a step in the proceedings is determined by the nature of the action and whether it indicates an unequivocal intention to proceed with the suit and to abandon the right to refer the dispute to arbitration.* An application is not a step in the proceedings, if it does not express the willingness of the defendant to go along with the determination of the courts instead of arbitration. A defendant who has specifically stated in the application or supporting affidavit that he intends to seek a stay is not estopped from asserting his right to invoke arbitration. An application, which is made in the event that the specific application for a stay is unsuccessful, is not a step in the proceedings. (Emphasis added.)

[39] The nature of the action and the facts in *Comos Industry Solutions GMBH* are different from our present case and can be easily distinguished. The

impugned application in *Comos Industry Solutions GMBH* was an application to set aside the Writ on the ground that the local courts lack the requisite jurisdiction to determine the dispute. Such an application is strictly procedural and preliminary and does not require the examination on merits. On the contrary, encl 24 in our present case is an application to strike out the appellant's writ under O 18 r 19(1)(b) of the Rules of Court 2012 on the grounds that the claim is scandalous, frivolous and vexatious. In such an application, the court will certainly have to determine the merits of the appellant's claim in order to adjudicate on the veracity of the same.

[40] Further, in *Comos Industry Solutions GMBH,* the appellant in that case had challenged the jurisdiction of the court to hear the dispute and had reserved their rights to refer the dispute to arbitration. In our instant appeal, the respondents (except the fourth respondent), as revealed from their affidavit in support in encl 24, had made an application to strike out the appellant's writ in its entirety on the grounds that it is scandalous, frivolous and vexatious. In the event that encl 24 is allowed in favour of the respondents, this would have created some form of estoppel or res judicata which would preclude the appellant from bringing the same claim against the respondents before the arbitral tribunal.

[41] Based on these reasons, we were of the view that the filing of encl 24 had clearly evinced an unequivocal intention on the part of the respondents to submit to the court's jurisdiction and proceed with the civil suit. The respondents act or conduct in filing encl 24 clearly indicated to us that they were willingly taking a step to participate in the proceedings in preference to arbitration.

[42] The decision by the Court of Appeal in Singapore in *L Capital Jones Ltd and another v Maniach Pte Ltd* [2017] SGCA 63; [2017] 1 SLR 312 is applicable to our present case. In that case, whilst applying to stay the court proceedings in favour of arbitration, the appellants applied to strike out the action on merits or, in the alternative, stay the proceedings in favour of arbitration. In that case, the Court of Appeal held that the striking out application was an act that signifies a submission to the court's jurisdiction. At para 78, it was held as follows:

> Far from repudiating the court proceedings, an application to strike out a claim on its merits is an affirmation of the court's jurisdiction to resolve the matter. Further, as the respondent points out, should the court have determined the striking out application in JtGGH's favour, this would have created some form of estoppel or res judicata, precluding the matter from being relitigated before an arbitral tribunal. *Thus, filing an application to strike out S 182/2015 on its merits certainly evinces 'an unequivocal intention to participate in the court proceedings in preference to arbitration.* (Emphasis added.)

In respect of the alternative prayer made to stay the proceedings, the court elucidated, at para 80, as follows:

> [80] It can be seen that one of the two grounds for striking out relied on by JtGGH was, in essence, that the respondent's claim lacked merit (para 3 of the grounds of application). *A stay in favour of arbitration was only prayed for in the alternative. In our judgment, this forecloses any argument that JtGGH had reserved its right to arbitrate the matter. SUM 998/2015 clearly prays first for a striking out on the merits, and, only if that was rejected, a stay in favour of arbitration as an alternative. Therefore, by filing SUM 998/2015, JtGGH had taken a step in the proceedings.* (Emphasis added.)

[43] The facts in our case are similar as in *L Capital Jones*. The respondents had first prayed for the civil suit to be struck out and in the alternative, a prayer for a stay of proceedings of the court action pending arbitration in encl 24. The respondents in praying, first, for the striking out of the civil suit on merits, and only when the striking out prayer is rejected, a stay in favour of arbitration as an alternative, had, by doing so, foreclosed any argument on their part that they had reserved their rights to arbitrate the matter. Again, it must be emphasised that the respondents cannot, by their action, be equated as reserving their rights to refer the matter for arbitration. We are of the view that the respondents, (except the fourth respondent), by filing encl 24 to strike out the appellant's Writ on merits, or in the alternative, to stay the court proceedings pending the disposal of the arbitration, had by their conduct, taken steps in the court proceedings pursuant to s 10(1) of the Arbitration Act 2005. Their conduct had evinced or had signified and affirmed their unequivocal intention and willingness to submit and participate in the court's proceedings to adjudicate the dispute in preference to arbitration. The respondents, cannot now, change their stance to go for arbitration. The learned judge thus has erred in allowing the proceedings to be stayed against the respondents pending the disposal of the arbitration between the appellant and the first respondent.

[44] On perusal of encl 7 on the stay application by the respondents (except the fourth respondent), we noticed that again, the respondents in their stay application which was premised under s 10 of the Arbitration Act 2005, had prayed first, for the civil suit to be struck out or second, the court action be stayed pending the matter to be referred for arbitration (similar prayers as in their striking out application in encl 24). Again, we are of the view that the first prayer made by the respondents in their stay application is not in consonant with an application made under s 10(1) of the Arbitration Act 2005 and, the respondents in doing so, had by their alternative prayers foreclosed any argument on their part that they had reserved their rights to arbitrate the matter.

Third ground of appeal: Second to fifth respondents are not parties to the arbitration agreement and the court's proceeding against them should not have been stayed by

the High Court pending disposal of arbitration

[45] In any event, we agreed with the submission of the respondents that the court proceedings against the second to fifth respondents should not have been stayed on the basis that they are not parties to the arbitration agreement between the appellant and the first respondent.

[46] The appellant's claim before the High Court involves a claim for fraud and/or fraudulent misrepresentation against the directors of the first respondent, i.e the second respondent to the fifth respondent, who are not parties to the arbitration agreement between the appellant and the first respondent. Section 10 of the Arbitration Act 2005 has no application in so far as the claims against the second respondent to fifth respondent are concerned. The second, third and fifth respondents had made their application pursuant to the court's inherent power to stay the court proceedings. The fourth respondent did not make any application for a stay.

[47] The Court of Appeal in *Protasco Bhd v Tey Por Yee and another appeal* [2018] MLJU 993; [2018] 5 CLJ 299 had cited the principles enunciated by the Singaporean Court of Appeal in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2015] SGCA 57 where the court when faced with court proceedings against non-parties to an arbitration agreement, having regard to the nature and content of the litigation as a whole, may order the following:

(a) that the whole of the court proceedings be stayed including those against the non-parties to the arbitration proceedings pending the determination of the arbitration;

(b) that the court proceedings to t h e extent of which is subject to the arbitration agreement be stayed, but on condition that the arbitration proceeds only after the resolution of the remaining court proceedings against the non-parties;

(c) that stay be allowed for the court proceedings to extent of which is subject to the arbitration agreement while allowing the remaining proceedings against the non•parties to proceed concurrently and in tandem; or

(d) that stay be allowed for certain issues while allowing other issues to be concurrently determined.

[48] The Court of Appeal in *Protasco* further listed the competing factors that ought to be taken into account by the court before exercising its discretion as set out above:

(a) the overlap in parties in the court proceedings and the arbitration;

A (b) the overlap of the issues that will be raised in the arbitration;

(c) the overlap in the factual matrix giving rise to the cause of action in both the court and arbitration proceedings;

(d) the overlap in principal witnesses for the primary parties in the court and
B arbitration proceedings; and

(e) the similarity in the reliefs sought.

[49] The position as elucidated by the Court of Appeal in *Protasco* is in line
C with those taken in other common law jurisdictions wherein the legislative provisions for stay in favour of arbitration are identical to that of Malaysia.

[50] In light of the above, we are of the view that the learned judge has erred
D in failing to consider the relevant factors in the present case which points against the exercise of discretion to stay the court proceedings against the second to the fifth respondents. These factors include that:

(a) the claims against the second to fifth respondents are made against them in their personal capacity for fraud and/or fraudulent misrepresentation
E and are not dependent on the breach of agreement by the first respondent;

(b) the second to fifth respondents are not parties to the arbitration agreement between the appellant and the first respondent and any other
F agreement to arbitrate. The determination by the arbitration tribunal in the relevant arbitration will not bind the second to fifth respondents;

(c) there are substantial overlaps on the facts and issues in the arbitration proceedings and those of the present civil suit. The arbitrator, when deciding on the cause of action of fraud during the arbitration, will be
G required to make a finding on the alleged fraud and/or fraudulent misrepresentation by the second to fifth respondents;

(d) there is real likelihood that the second to fifth respondents will seek to re-litigate the issues if the arbitration does not result in their favour; and
H

(e) the outcome of the civil suit will afford certainty in evidence with respect to the veracity of the claims of fraud and/or fraudulent misrepresentation against the second to fifth respondents, which would facilitate the arbitration to a great extent rather than prejudice the same.

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[51] In light of what we have stated above, it is evident that the learned judge had not considered the abovementioned factors, otherwise the learned judge would not have arrived at the decision that a stay of the proceedings should be granted vis a vis the second to fifth respondents.

[52] The appellant submitted that instead of staying the whole of the civil suit, this court ought to exercise its discretion on either of the following options: A

(a) stay the court proceedings pursuant to s 10 of the Arbitration Act 2005 in relation to the parties to the arbitration agreement but on condition that arbitration proceeds only after the resolution of the court proceedings against the second to fifth respondents, which the appellant submitted was the option preferred in *Protrasco*; or B

(b) stay the court proceedings pursuant to s 10 of the Arbitration Act 2005 in relation to the parties to the arbitration agreement and allow the claims against the second to fifth respondents to proceed concurrently or in parallel. C

[53] After considering the facts and circumstances of this appeal and after hearing the submissions of both parties, we are unanimous in our view that either option as submitted by the appellant is not suitable and that the stay as ordered by the learned judge for the court proceedings be lifted and all parties proceed for trial in court. The reasons are as follows: D

(a) the learned judge had failed to appreciate that the first respondent had committed a repudiatory breach which rendered the arbitration agreement between the appellant and the first respondent inoperative when it repeatedly refused (after numerous reminders from the appellant and KLRCA from November 2016 to March 2017) to pay its portion of the total provisional advance deposit to KLRCA; E F

(b) the nominated presiding arbitrator had accepted the nomination by the appellant and the first respondent on 15 December 2016. The appellant had paid its portion of the provisional advance deposit on 29 November 2016 as directed by KLRCA. But the first respondent only paid its portion of the provisional advance deposit on 9 January 2018, that is after more than a year had passed after being directed by the KLRCA to do so and only after the appellant had filed the civil suit on 1 November 2017. The conduct of the first respondent evinced its disinterest or abandonment to proceed with arbitration, therefore waiving its rights under the Umbrella Agreement, rendering the arbitration agreement between the appellant and the first respondent inoperative; G H

(c) the learned judge had misapplied the principles in *Comos Industry Solutions GMBH* and had erred in holding that the filing of encl 24 to strike out the appellant's Writ by the respondents did not constitute as taking a step in the proceedings and a submission to the court's jurisdiction to adjudicate the dispute. The learned judge had erred in not holding that the filing by the respondents of encl 24 demonstrated their intention to abandon unequivocally the matter to be referred for I

arbitration in preference for the dispute to go for trial in the court action;

(d) further, the respondents in praying first, for a striking out of the Writ and second, for a stay of the civil suit in encl 7 (stay application), which application is not in consonant with an application made under s 10 of the Arbitration Act 2005, had, by their alternative prayers foreclosed any argument on their part that they had reserved their rights to arbitrate the matter; and

(e) the learned judge had failed to consider the relevant factors and had taken into account irrelevant factors in deciding to stay the court proceedings as against the second to fifth respondents who are not parties to the arbitration agreement.

CONCLUSION

[54] For the reasons stated above, we allowed this appeal with agreed costs of RM10,000 to the appellant subject to the payment of allocator fees. The decision of the High Court dated 11 October 2018 was set aside. We further ordered all the five respondents to proceed in the civil suit. Deposit, if any, was to be refunded to the appellant.

Appeal allowed; High Court's decisionbset aside; andsuit against the respondents ordered to be proceeded with.

Reported by Ashok Kumar